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January 28, 2005

ELECTRONICALLY FILED

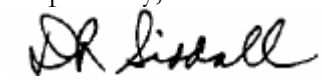
Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20054

Re: CS Docket No. 98-120
Carriage of Digital Television Broadcast Signals

Dear Ms. Dortch:

Enclosed is a paper responding to the letter filed in this docket on September 19, 2004, by James L. Casserly, Counsel for Comcast Corporation. This paper is filed pursuant to Section 1.1206(b)(2) of the Commission's Rules.

Respectfully,



David R. Siddall

DRS:dfr
Enclosure
cc: Honorable Michael K. Powell, Chairman
Honorable Kathleen Q. Abernathy
Honorable Michael J. Copps
Honorable Kevin J. Martin
Honorable Jonathan S. Adelstein
W. Kenneth Ferree, Chief, Media Bureau
Austin Schlick, Acting General Counsel
Jon Cody, Legal Advisor, Chairman Powell
Stacy R. Fuller, Legal Advisor, Commissioner Abernathy
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DIGITAL CARRIAGE OF LOCAL STATIONS: MORE BENEFIT FROM LESS CAPACITY

ANALYSIS OF COMCAST SEPTEMBER 16, 2004 LETTER

NBC Television Affiliates and
NBC Owned and Operated Stations

Prepared by

Larry Sidman and David Siddall of
Paul, Hastings, Janofsky & Walker LLP, Counsel

January 27, 2005

INTRODUCTION AND SUMMARY

In an April 2004 white paper on digital multicast must carry,[1] the authors explained why cable carriage of all free digital broadcast programming will be much less a burden on cable capacity in 2007 than in the 1990s when Congress enacted and the Supreme Court affirmed the must carry statute; why the public policy justification for multicast must carry in the post-DTV transition period is even more compelling now than in the 1990s; and how the multicast programs planned by broadcasters will advance governmental interests even further. The white paper and this additional analysis address cable retransmission only of a single 6 MHz broadcast channel; dual carriage issues are not addressed.

The September 16, 2004 letter filed by counsel to Comcast Corporation fails to rebut any of the three key realities underlying the conclusions of the Multicast Must Carry Paper.[2] Additionally, after the Multicast Must Carry Paper was filed, the heads of both Comcast (Brian L. Roberts) and Charter (Paul Allen) each spoke of cable's success in rapidly transitioning their systems to digital and independently confirmed in public statements the underlying conclusion of the Paper that cable will rapidly transition to all-digital systems. In addition to setting out the plans for their transition to all-digital systems, the CEOs touted the benefits of the unprecedented capacity that will be recovered from the analog spectrum without additional upgrades to their cable systems. Given the irrefutable technological fact that carriage of all broadcast digital programs will require less cable capacity than the current carriage of analog broadcast programs

[1] *Digital Multicast Must Carry: Greater Public Benefits, Less Burden on Cable Operators* ("the Multicast Must Carry Paper") as filed with the Commission on April 23, 2004 by the NBC Television Affiliates Group, the CBS Television Network Affiliates Association, the ABC Television Affiliates Association and the NBC Television Station Group.

[2] Letter from James L. Casserly, Counsel for Comcast Corporation, dated September 16, 2004 and filed in CS Docket No. 98-120 ("Comcast September 16 letter").

and that its own CEO touts the advantages of Comcast's all-digital plans, Comcast's continued protests in this proceeding simply have no credibility.[3]

Continued mandatory carriage of all free television broadcast programs is required by statute and justified by the facts.

- *Cable capacity has nearly doubled.* In 1992, most cable systems had 450 MHz or less in capacity. At the end of 2004 cable systems passing 91.5% of all homes passed by cable have a capacity of 750 MHz or more. This compares to 85% just one year earlier.[4] With only 8.5% of homes passed by cable today having less than 750 MHz of capacity, by 2009 all but the very smallest systems will have at least 750 MHz. Moreover, cable operators are actively exploring and implementing technological means for further expanding capacity, including use of 256 and even 1024 QAM. [5]

- *Digital requires less capacity than analog.* Cable carriage of all local stations' free digital programs as broadcast, whether in high-definition or multicast format, will require a fraction of the capacity required to carry today's analog broadcast signals.[6] In all but the largest markets, mandatory cable carriage of all local free digital broadcast signals in their entirety will require less than 10% of a typical cable system's capacity -- far less than the maximum 33-1/3% permitted by law.

- *The law has not changed.* The must-carry regime established in 1992 and later twice upheld by the Supreme Court has not changed.[7] Under the law, cable systems must carry the broadcast signals of local stations using up to one-third of their cable capacity; cable systems cannot materially degrade the broadcast signals; and the Commission must "establish any changes in the signal carriage requirements of cable

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[3] *See* Presentation of Brian L. Roberts to the 15th Annual Entertainment, Media & Telecommunications Conference on January 10, 2005, video and audio available at http://www.veracast.com/webcasts/sbcitigroup/emt-2005/76107549.cfm (visited Jan. 19, 2005). Mr. Roberts stated that 80 analog basic cable channels are simulcast digitally using only 10 channels; and that the channels are channel mapped so that nothing changes for the consumer continuing to use an analog (NTSC) set. (Viewed at 06:45-08:00.) In response to a question, Roberts added that going to all-digital will not have a significant effect on capital spending, net-net, because of low prices for digital-only set top boxes and other savings and revenues made possible by the switch. (Viewed at 36:30-38:50.)

[4] *Cf.* National Cable & Telecommunications Association's 2003 and 2004 Year-End Industry Overviews available at http://www.ncta.com/pdf_files/Overview.pdf

[5] An upgrade to 1024 QAM from 64 QAM further increases data throughput by approximately 25%. *See* the Multicast Must Carry Paper, *supra*, note 1at 8.

[6] Whether that fraction is one-half, two-thirds, or less than one-half depends on the particular modulation scheme, 256 QAM, 64 QAM, or 1024 QAM, chosen by the cable operator.

[7] *See Turner Broadcasting System, Inc. v. Federal Communications Commission*, 520 U.S. 180 (1997). *See also Turner Broadcasting System, Inc. v. Federal Communications Commission*, 512 U.S. 622 (1994).

> television systems necessary to ensure cable carriage of such broadcast signals of local commercial television stations" following the digital transition.[8]

Accordingly, the central conclusion of the Multicast Must Carry Paper remains undisputed that full digital multicast must carry will require significantly less cable capacity, both in absolute and relative terms, than was the case in 1990s when the statute was congressionally enacted and judicially affirmed.

At least implicitly, in its letter Comcast agrees that the issue is not one of cable capacity. Counsel asserts that Comcast is ready to devote up to 10.6 MHz to carry any single station it wishes to carry, which greatly exceeds the 2 - 4 MHz of capacity needed to retransmit all of each station's free digital broadcast programming. Accordingly, it is apparent that Comcast's real objection to multicast carriage is that it would have to carry <u>all</u> local programming as it does now, whereas Comcast would prefer to discriminate among the local stations that it must carry. Such a result plainly would contradict congressional intent underlying the statute that remains unchanged from that affirmed by the Supreme Court in 1997.

COMCAST FAILS TO DEMONSTRATE ANY TECHNICAL BAR TO MULTICAST CARRIAGE

Comcast agrees that carriage of an entire high-definition digital broadcast signal will require from 2 - 4 MHz of spectrum, a range comparable to the 3 MHz for each local digital signal projected in the Multicast Must Carry Paper. Comcast also concedes that most cable systems have far more capacity today than when the Supreme Court upheld the must carry statute in 1997. Finally, Comcast does not refute real projections of total cable capacity required to carry a station's entire digital signal.

[8] 47 U.S.C. § 534(b)(4)(B).

Instead, Comcast complains about the potential burden that it alleges will be voluntarily borne by cable operators following the digital broadcast transition.[9] Comcast bases its complaint on three dubious predictions of cable operators' future conduct.

- *Voluntary Analog AND Digital Carriage.* Comcast claims that cable operators voluntarily will duplicate in analog one program stream from local stations to ensure that they serve their digital customers without depriving their analog subscribers of local television signals.
- *Indefinite Analog.* Comcast claims that it must provide some measure of "analog" signals for many years following the end of the broadcast digital transition.
- *Speculative Demand for Other Services.* Comcast claims that exploding demand for other services will limit cable capacity able to be devoted to broadcast carriage.

Even as a technical matter, the bases for Comcast's assertions are not credible.

Voluntary Analog and Digital Carriage. Comcast claims that, subsequent to the cessation of analog broadcasting, cable MSOs voluntarily will offer their subscribers no fewer than three feeds of the same program: a voluntary analog feed occupying 6 MHz, an HDTV feed requiring 2 - 4 MHz, and a "compressed" standard definition feed of 0.6 MHz.[10] Thus according to Comcast, the collective carriage of these three feeds will demand up to 10.6 MHz per station. In other words, Comcast is willing to commit 10.6 MHz per station to carry multiple feeds of identical programming, but opposes the Commission requiring cable operators to devote only 2 - 4 MHz per station even though that 2 - 4 MHz would deliver new program diversity to consumers.

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[9] These alleged burdens arise because cable operators, unlike broadcasters, are not subject to any government deadline for a final transition to all-digital operations. Individual cable operators may delay the complete transition to digital television for as long as and for whatever customers they choose.

[10] Comcast September 16 letter at 3. Comcast does not explain why it would use its cable capacity for a second digital feed in standard definition rather than use the ability of decoding chips to display digital programming in the digital format or formats correct for the connected display device.

Comcast's depiction of this post-DTV transition scenario, if intended to apply to all broadcast stations as implied, simply is not credible. For years, cable operators have rejected any possibility of mandated carriage of both a digital and an analog signal per station when such dual carriage could have accelerated the digital transition.[11] Now, Comcast postulates a "voluntary dual+" carriage regime indefinitely that requires use of at least three times more cable capacity than necessary to transmit all of each broadcaster's programs.

Although not clear from Comcast's letter, it seems that this stance is consistent with Comcast's past positions on dual carriage only if Comcast does not intend to treat all local stations equally. Instead, it appears that Comcast may seek to pick and choose among local stations – giving some local stations dual carriage (and a huge leg up in the marketplace) while according others only the bare minimum that the FCC requires. If this is Comcast's intended scenario, what Comcast is actually protesting is the principle of nondiscriminatory treatment of all local stations that is common to both the cable and satellite must-carry regimes.

Indefinite Analog Feeds. Comcast's suggestion that it believes it must deliver an analog feed indefinitely likewise has no principled or factual support, and contradicts the stated intention of Comcast's own CEO. Any need for an analog feed would be driven by the cable operators' own choice to delay their (and their consumers') transition to digital television beyond the deadline for termination of analog broadcast signals. This is not a technological issue, it is an issue that would result from Comcast's preferred business plan. The only need for an analog

[11] *See,* Reply Comments of Comcast, CS Docket No. 98-120 (filed Aug. 16, 2001); *see also* Opposition of National Cable & Telecommunications Association to Petitions for Reconsideration, CS Docket No. 98-120 (filed May 25, 2001); Comments of National Cable & Telecommunications Association, CS Docket No. 98-120 (filed June 11, 2001); Reply Comments of National Cable & Telecommunications Association, CS Docket No. 98-120 (filed Aug. 16, 2001).

feed on the long term would be as cable's preferred means for holding analog consumers harmless for cable's failure to transition these subscribers to digital on a timetable similar to the government mandate for broadcasters.

That Comcast even suggests this argument to the Commission is startling, given the speeches and statements of its CEO, Brian L. Roberts, as well as others such as Paul Allen, CEO of Charter. It is clear that rather than convert digital signals to analog for an extended period, cable companies in fact are working to convert their systems to all-digital systems as soon as possible and that at the present rate in many systems this could be accomplished by the end of the broadcast transition. On January 10, 2005 at the 15th Annual Smith Barney Citigroup Entertainment, Media and Telecommunications Conference, Comcast's CEO, Brian L. Roberts set forth Comcast's road map for expediting the transition of all cable subscribers to an exclusively digital system. Roberts' description included Comcast's plans to simulcast analog and digital for a limited period while driving down the cost of all-digital cable boxes to $50 or less. Roberts recognized that removing analog feeds from cable systems frees up substantial capacity for other cable services. Unlike the scenario described by Comcast's counsel in the FCC proceeding, Roberts' scenario is realistic and a worthy objective for Comcast.[12] Nor is Comcast's Roberts alone in realizing the tremendous benefits for cable to transition to all-digital systems rapidly. Paul Allen, CEO of Charter, recently agreed that cable "will blaze the path to all-digital transmission systems over the next couple of years."[13]

[12] *See* fn. 3, *supra*.

[13] *See* Communications Daily, Vol. 25, No. 10 at p.5 (Jan. 14, 2005).

As troubling, Comcast's "voluntary" analog proposal, if carried through, would harm consumers. Comcast's proposal inevitably would either deprive analog consumers of their established access to all free broadcast programming or shortchange digital consumers from getting the benefits of their investment in digital receivers. Because Comcast would be able to pick and choose which programs it would carry in analog from each station, many stations may not have the opportunity to ensure carriage of an analog version of one of their programming streams to all analog subscribers while at the same time ensuring full carriage of all of their digital offerings to digital cable subscribers. Analog consumers would lose access to existing programming while digital consumers would not get what they paid for when they bought digital receivers.

Moreover, investing Comcast with the ability to pick and choose which local stations it wants to deliver in analog would allow cable operators to bias competition among local broadcast stations. Congress recently prohibited Echostar from discriminating among broadcasters in an analogous situation (putting stations in the same market on different satellites). Echostar was required to provide comparable carriage to all broadcast stations in the same market. While some cable operators may offer disfavored broadcast stations' analog feeds on a "premium" tier, under Comcast's "voluntary" proposal (as well as under the reported "Ferree Plan" proposal) cable operators also could choose not to offer selected stations in either analog or standard definition digital.

Regardless, Comcast's own data demonstrate that any need for an analog feed will not be just transitional, but fleeting. The September 16 Comcast letter admits that 37.5 percent of its

customers subscribed to digital service as of June 30, 2004.[14] That speedy adoption is continuing: Comcast has reported that 39.1 percent of its customers have switched to digital as of September 30.[15] Assuming past rates of growth, all or nearly all Comcast customers will be digital service subscribers by 2009. Of course, the ultimate rate of adoption likely depends on the incentives cable operators offer to encourage or discourage the transition of their legacy subscribers, in part based on issues such as multicast carriage requirements.

The speed with which consumers are adopting digital cable services is illustrated by the success of the Charter Communications system in Long Beach, California. As stated in the Multicast Must Carry Paper, on January 15, 2004, Charter announced that this system was the first all-digital system to operate in the United States.[16] We said that "It appears that many cable systems will have a majority of digital subscribers within two or three years and will begin discontinuing analog services as soon thereafter as possible." The only thing that may be incorrect about our forecast is that it may be too pessimistic about the rate of consumer adoption of all-digital cable. At the end of 2004, less than one year after roll-out, 70% of Charter's Long Beach subscribers are reported to use the all-digital system instead of the analog.[17] Taking note of this astonishing transition rate, Charter CEO Paul Allen indicated that "Charter's initial rollout . . . will lead to fully digital plants and the reclamation of analog spectrum, beginning next year."[18]

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[14] September 16 Comcast letter at 2.

[15] Comcast Press Release, "Comcast Reports Third Quarter 2004 Results" (Oct. 27, 2004).

[16] *See* Multicast Must Carry Paper, *supra* note 1, at 14.

[17] *See* Alan Breznick, editor, *Cable Digital News*, Cable Operators Prepare for Switch to All-Digital Systems at http://www.cabledatacomnews.com/jan05/jan05-2.html (viewed Jan. 11, 2005).

[18] *Supra* note 13.

It is important to note with regard to all-digital cable systems that digital cable boxes have one or more analog outputs that connect to analog NTSC television sets. Thus there is no technological barrier to all-digital systems rapidly approaching subscribership of 100%, at which time the cable company can reclaim all of the analog spectrum for new digital services and subscribers can migrate to digital receivers at their own pace.[19] An additional – and crucial – advantage of this all-digital network cable architecture is that on cable each digital broadcast signal retransmitted in digital would occupy only 2 - 4 MHz instead of 6 MHz, yet provide the subscriber with every multicast program. If Comcast can opportunistically recover unused bits, as in this proceeding it argues is possible,[20] then the bits broadcast for paid services can be recovered and used by the cable system without impairing reception of the free over-the-air multicast programming and further lessen any must carry "burden."

Speculative Demand for Other Services. As to the third point, Comcast contradicts its own statements. On the one hand, Comcast expresses willingness to fence off up to 10.6 MHz of capacity per local signal to enable carriage of a program to all its subscribers – substantially more than the 2 - 4 MHz per local digital signal necessary to deliver all of a local station's digital streams to all analog and digital consumers using a simple analog output from a digital set-top box. On the other hand, Comcast claims that it cannot spare any significant amount of new spectrum in light of the demand for video on demand, high speed Internet capabilities and the

[19] Comcast's CEO Roberts explained just this point at the recent conference referenced at fn. 3, *supra*.

[20] *See* Comcast October 4, 2004, *ex parte* Notice at p. 2.

necessity for much greater upstream communications capacity to support interactive applications, including IP telephony.[21]

But Comcast does not explain why, if capacity is so precious, it would prefer to carry multiple streams of identical programming rather than do more during the remaining digital transition period to facilitate its customers becoming digital-ready, either through digital sets or digital cable set top boxes (which have analog outputs). The latter approach would require only 2 - 4 MHz of spectrum capacity on the cable system to retransmit the entirety of each digital broadcast signal. When compared to the system cost of losing 60 or more MHz of capacity to carry multiple analog feeds from 10 or more local broadcast stations, it is difficult to believe that the cable set-top box solution would not be chosen quickly for delivering digitally-originated programming to consumers' legacy analog television receivers.

OTHER TECHNICAL FALLACIES UNDERMINE COMCAST'S STANCE

The September 16 Comcast letter also seeks to attack the credibility of the Multicast Must Carry Paper by taking issue with a number of other technical assumptions. That effort misses the mark as well.

Comcast attempts to make much of the fact that the Multicast Must Carry Paper assumes that cable will employ 256 QAM modulation, whereas Comcast states that "today most of Comcast's digital channels are carried using 64 QAM, which carries 28 mbps per 6 MHz channel – so the broadcasters' DTV signals currently require 2/3, not 1/2 (or 1/3) of a 6 MHz slot."[22] The key operative words in the Comcast letter are "today" and "most." The issue before the

[21] *See* September 16 Comcast letter at 3-4.

[22] *See* September 16 Comcast letter at 5.

Commission in this proceeding is the environment after the DTV transition, which the FCC projects will occur in 2009 or later. What Comcast has not explained is why it would utilize the less efficient 64 QAM modulation technique. As reported as far back as 1999, "experiments are currently underway for channel-coding digital services using 1,024 QAM (rather than the more usual 64 and 256 QAM) enabling approximately 25 percent more data throughput for a given RF bandwidth."[23] When the post-DTV transition must carry rules take effect, cable systems desiring to maximize their capacity undoubtedly will use at least 256 QAM modulation and the entirety of a broadcaster's 19.4 mbps digital signal will occupy no more than the equivalent of 3 MHz of spectrum capacity in a cable system, as described in the Digital Multicast Must Carry Paper.

The September 16 Comcast letter also suggests using MPEG-4 in connection with the transmission of broadcast signals. In doing so, however, Comcast appears to ignore the growing installed base of MPEG-2 receivers resulting from the technical requirements of the Commission's unidirectional digital cable ready products Order.[24] With these requirements in place, it is unlikely that MPEG-4 compression could be used for carriage of digital broadcast signals without depriving millions of viewers access to over-the-air television. On the other hand, MPEG-4 could well be used to achieve additional spectrum efficiencies for VOD and other advanced services since MPEG-4 requires about half the bit rate of MPEG-2. Thus, any use by Comcast of MPEG-4 would strengthen rather than weaken the central tenet of the Multicast Must Carry Paper that carriage of all programs on digital broadcast signals will result in substantially

[23] Scientific Atlanta, *Increasing Network Capacity At Reasonable Cost*, (1999) *at* http://www.sciatl.com/products/consumers/white-papers/netcap.pdf.

[24] *See* 47 C.F.R. §§ 76.602, 76.640.

less burden on cable systems after the DTV transition than is currently the case for must carry of analog signals.

COMCAST'S LEGAL CLAIMS IGNORE ESTABLISHED CONGRESSIONAL POLICY GOALS

Comcast, using a tricky play on words, incorrectly asserts that Congress was oblivious to high definition and advanced television when the must carry requirements were enacted in 1992. In fact, the opposite is true. In 1992 the Congress and the Commission were in their sixth year of examining advanced television. The FCC already had adopted proposals to designate a second channel to be used while the first channel remains on the air during a transition period.[25] By 1992 Congress also had held multiple hearings on advanced and high definition television.[26] As a result, Congress in the statute itself directly addressed must carry in the world of advanced television. The statute is clear on its face not only that Congress contemplated the Commission adopting a new technical system for television broadcasting, but explicitly included broadcast stations using the new system within the ambit of the statutory must carry requirements.

With this background and an expectation that the Commission would follow through and complete its work, Congress provided that the Commission "shall initiate a proceeding to establish any changes in the signal carriage requirements of cable television stations necessary to

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[25] *See, First Report and Order* in MM Docket No. 87-268, 5 FCC Rcd 5627 (1990); *Notice of Proposed Rule Making* in MM Docket No. 87-268, 6 FCC RCD 7024 (1991); and *Second Report and Order/Further Notice of Proposed Rule Making* in MM Docket 87-268, 7 FCC Rcd 3340 (1992).

[26] *See, e.g., High Definition Television and Other Advanced Television Systems: Hearing Before the House Comm. on Energy and Commerce Subcomm. on Telecommunications and Finance*, 100th Cong. (Oct. 8, 1987) (Serial No. 100-188); *Advanced Television Technologies: Hearings Before the House Comm. on Energy and Commerce Subcomm. on Telecommunications and Finance*, 100th Cong. (Jun. 23, Sept. 7, 1988) (Serial No. 100-188); *High Definition Television: Hearings Before the House Comm. on Energy and Commerce Subcomm. on Telecommunications and Finance*, 101th Cong. (Mar. 8, 9, 1989) (Serial No. 101-34).

ensure cable carriage of such broadcast signals of local commercial television stations which have been changed to conform with such modified standards."[27] The phrase "necessary to ensure cable carriage of such broadcast signals" – not carriage of individual programming streams – underscores that the statutory requirement supports carriage of the "signal" containing free broadcast programs without regard to the number of programs at any particular instant in time.

Furthermore, the statutory scheme itself evidences Congress' belief that its statutory must carry provisions include all "multicast" broadcast programs within the broadcast signal. For the very reason that the mandate requires cable retransmission of all broadcast programs, Congress provided in a 1996 amendment to the Communications Act that broadcast ancillary and supplementary (*i.e.*, paid) programs have no must carry rights.[28] It would have been entirely superfluous for Congress to enact a provision excluding ancillary and supplementary programs from cable must carry requirements if the statutory must carry regime only required carriage of one program per signal, and as the Commission itself has acknowledged, "effect must be given to every word of a statute and that no part of a provision will be read as superfluous."[29] The root of the Commission's misinterpretation of "primary video" as used in the must carry statute is its assumption that "primary" has to mean "one". Nothing in the legislative history nor in the

[27] 47 U.S.C. § 534(b)(4)(B). The "advanced television" system adopted by the Commission in 1996 is the ATSC digital system.

[28] *See* 47 U.S.C. § 336(b)(3).

[29] *See* Sutherland, Statutory Construction, Vol. 2A at § 46.06, cited by the Commission in this proceeding, *Carriage of Digital Broadcast Signals*, CS Docket No. 98-120 (also CS Docket Nos. 00-2 & 00-96), First Report and Order and Further Notice of Proposed Rule Making, 16 FCC Rcd 2598 at ¶ 54 (2001) ("First Report and Order").

dictionary definition relied upon by the Commission[30] requires such a conclusion. "Primary video" can be any number of simultaneous video streams – in this case, "primary" over subscription, ancillary and secondary video streams.

Comcast's proposal also ignores localism, diversity and competition. Having failed to undermine the "less burden on cable operators" aspect of the Multicast Must Carry Paper, the September 16 Comcast letter then attacks the "greater public benefits" component of the analysis. Comcast does not dispute that digital enables both broadcasters and cable operators to deliver more programming to consumers. What Comcast takes issue with is whether more programming choices – even more local programming choices – is a public benefit.

Comcast's attacks are not issues of technology, but law. And the law on this issue is beyond dispute. In 1997, the Supreme Court upheld mandatory carriage because of three strong governmental interests identified by the Congress: (1) preserving the benefits of free, over the air local broadcast television, (2) promoting the widespread dissemination of information from a multiplicity of sources, and (3) promoting fair competition in the market for television programming.[31]

Localism. Comcast's response to the business model of dramatically increased and more focused coverage of community news, information and public affairs programming is to mock "coerced coverage" of 24 thermometers or parades.[32] By demeaning a localism centric, public interest vision of digital multicast must carry, Comcast demeans the fundamental principles that

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[30] *See* First Report and Order, *supra* note 30 at ¶¶ 54-55. Neither of the dictionary definitions relied upon, "First or highest in rank, quality, or importance" and "Being or standing first in a list, series, or sequence", precludes there being multiple video streams "first or highest in rank . . ." etc. Indeed, in most things in life multiple people or objects can simultaneously be "first," such as oranges "first in quality" as distinguished from those of lesser quality.

[31] *See Turner Broadcasting System*, 512 U.S. at 662.

[32] *See* September 16 Comcast letter at 5-6.

Congress obligated the Commission to foster in the Communications Act and on which the Supreme Court upheld mandatory carriage under the 1992 Cable Act.

Diversity. Similarly, Comcast's conclusions are erroneous that the economics of broadcasting will not support more local news and information programming and will lead to multiple channels with redundant or similar content. Multicasting will enable stations to sell more ad avails, in turn generating more revenue. These additional ad revenues will allow stations to fund new local news and sports programming. Broadcasters have no incentive to transmit redundant programming on multiple channels because they cannot attract viewers by doing so. Without new viewers, there is no additional ad revenue.

As detailed in substantial filings submitted in this docket earlier, digital multicasting will enable broadcasters to diversify their programming to target niche audiences and focus more programming on their local communities.[33] Multicasting also will lower a station's cost to invest in local news gathering and sports competitions by allowing more use of the same assets on programming that has a short shelf life. Such new local programming has long been an important public interest objective articulated by the Commission, and as set forth in the record, many broadcasters have substantive plans to use the digital multicast opportunity to increase local programming. However, their ability to do so on a sustainable basis depends upon the programs reaching the local community and not being stripped out of the broadcast signals subject to must carry.

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[33] *See Special Factual Submission in Support of Multicast Carriage by the NBC Television Affiliates Association* (filed on Jan. 8, 2004); *Multicasting Opportunities for NBC Affiliates & NBC Owned Stations filed by the NBC Affiliates Association* (filed on Jan. 12, 2004); and *Special Factual Submission by the CBS Television Network Affiliates Association in Support of Multicast Carriage Requirement* (filed on Jan. 13, 2004).

Broadcast stations are undergoing significant economic pressure that threatens to result in erosion or even elimination of existing levels of news programming and other services.[34] Digital multicast must carry would provide the means to continue and increase these vital local services. Such an approach is calculated to attract viewers. Thus, the economics of digital multicast must carry align precisely with the twin public policy goals of promoting diversity and localism, precisely the opposite of Comcast's contentions.

Competition. Finally, Comcast criticizes the Multicast Must Carry Paper by asserting that Comcast, a cable industry leader, offers local avails on only 40 channels, not 100 as the Multicast Must Carry Paper assumed. Ironically, this observation only illuminates the core anticompetitive reason for Comcast's (and the cable industry's) opposition to digital multicast must carry. Comcast wants to stifle any hint of competition in the local television advertising market. Digital multicast must carry would compete for local advertising revenue. Comcast is determined to stifle the new revenue opportunities for local broadcasters deriving from digital multicasting.

Thus, Comcast in its September 16 letter perhaps unwittingly exposes what really is at stake in the digital multicast must carry debate. The burden on cable's spectrum capacity is a red herring. The real driving force behind the cable industry's vigorous opposition is a fear that digital multicast might enable broadcasters to provide some modest amount of increased competition in the video marketplace.[35]

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[34] *See*, SmithGeiger LLC, Newsroom Budgets in Midsize (51-100) and Small Markets (101-210). Prepared for NAB, December, 2002, and submitted to the FCC by NAB attached to its Comments in MB Docket No. 02-277.

[35] *See* Chart "MSO Advertising Share" in the Appendix.

CONCLUSION

In the television broadcast marketplace digital technology will enable more localism; greater diversity of programming, including Spanish and other foreign language programming, to meet the unique needs of historically underserved populations; and more competition. The need for all three is greater today than it was in 1992 when Congress enacted the must carry statute. Digital broadcasts will permit these needs to be met and all digital programs to be carried by cable with substantially less burden on cable operators than with analog broadcasts and well below the one-third of cable's activated capacity permitted by law.

APPENDIX

MSO Advertising Share

MSOs will Control Massive Amounts of Ad Inventory …
Leaving Broadcasters Marginalized in Local Markets

Cable MSOs Will Have More Outlets to Sell …

- 4 Major Television Network Affiliates vs. 100 Cable Channels controlled by a single MSO

… And New Technology That Will Allow Coordinated Selling

- Cable Will Have Upper Hand in Selling Local Advertisements